

## R E M A R K S

Claims 1, 2, 4 - 20, 31-38 and 41-51 are in this application. Claims 3, 21-30 and 39 and 40 have been cancelled. Claims 8 - 20, 47 and 48 have been withdrawn.

Applicants preserve all rights to file one or more divisional applications directed to subject matter disclosed in this application and not presently claimed.

It is submitted that Claims 32, 33, 34, 36, 37, 38, 50 and 51 should not be withdrawn and should be allowed with Claims 1, 2, 4 - 7, 31, 35, 41 - 46 and 49.

Claim 31 defining a pharmaceutical composition was examined. Claim 32 which defines the form of the composition of Claim 31 should be examined together with Claim 32. It is requested that the Examiner explain the basis for his statement that a form of a novel and nonobvious composition defines a different invention from the invention of the broader composition claim. This also applies to Claim 36 which depends from Claim 35.

Since the compound Claims 1 - 7 and 41 to 46 are novel and nonobvious, the method of treatment Claims 33 - 34, 37 - 38, 50 and 51 which define use of these novel compounds should also be examined in this application.

According to the Official Action, Claims 1, 2, 4 - 7, 31, 35, 41 - 46 and 49 are rejected under the judicially created doctrine of obviousness type double patenting over Claims 1 - 8 and 79 of co-pending U.S. Patent Application 10/613,414.

This rejection is respectfully traversed.

Firstly, this rejection is premature because the claims in U.S. Patent Application 10/613,414 have not been patented.

Secondly, according to MPEP 804 in determining whether a nonstatutory basis exists for a double patenting rejection, the first question to be asked is - does any claim

in the application define an invention that is merely an obvious variation of an invention claimed in the patent?

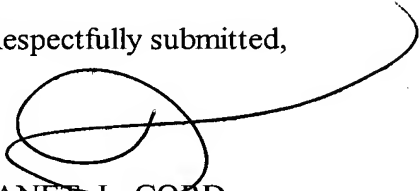
In this case the answer is no. Obviousness-type double patenting requires rejection of an application claim when the claimed subject matter is **not patentably distinct** from the subject matter claimed in a commonly owned patent when the issuance of a second patent would provide unjustified extension of the term of the right to exclude granted by a patent. See *Eli Lilly & Co. v. Barr Labs., Inc.*, 251 F.3d 955, 58 USPQ2d 1865 (Fed. Cir. 2001); *Ex parte Davis*, 56 USPQ2d 1434, 1435-36 (Bd. Pat. App. & Inter. 2000).

The claims in this application are not obvious over the claims of U. S. Patent Application 10/613,414. In Claim 1 of this application the definition of Z is defined as oxygen. The claims in U.S. Patent Application 10/613,414 have been amended to delete oxygen and sulfur from the definition of Z. It is not obvious from the claims of U.S. Patent Application 10/613,414 that Z can be defined as oxygen. Furthermore, the definition of R<sup>1</sup> in this application is broader than that of R<sup>1</sup> in application 10/613,414.

Therefore, since the claims in this U.S. Patent application are not obvious over the claims of U.S. Patent Application 10/613,414 it is respectfully requested that this obviousness type double patenting rejection be withdrawn.

Applicants submit that the present application is in condition for allowance and favorable consideration is respectfully requested.

Respectfully submitted,



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